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SUPREME COURT, U. S.

No. 896.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

FRANK MASHAK,
Petitioner,

vs.

DOROTHY DELORES PASTERNAK,
Respondent.

BRIEF

Of Dorothy Delores Pasternak in Opposition to Petition for Certiorari.

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OPINIONS BELOW.

The opinion of the Supreme Court of Missouri, dated July 12, 1967, has not been reported as of December 29, 1967, for the reason that on date of September 15th, 1967, the Supreme Court of Missouri granted petitioner's Motion for an order to Stay Mandate for ninety (90) days.

Said opinion will probably appear in 420 S. W. 2nd . . .; however, the opinion is set forth in petitioner's Petition for Writ of Certiorari under designation Appendix A. The memorandum opinion of the trial Judge is unreported (referred to by petitioner as R. 636 to 640), and printed as Appendix B in Petition for Certiorari (A-9).

Petitioner has notified respondent of the date of filing of his Petition and of the Docket Number of the case in this Court. However, he has failed to indicate on said notification form the contents of the record filed, as provided by Supreme Court Rule 21 (2). Hence, respondent cannot refer to page numbers of the record in the lower Court beyond Page 633, and reference to the Supplemental Transcript of the Record on Appeal.

JURISDICTION.

The judgment of the Supreme Court of Missouri of July 12, 1967, is not subject to review in this Court, for the reason that no final judgment or decree has been rendered by the Supreme Court of Missouri, as will hereinafter more fully appear, within the purview of the jurisdictional statute of the United States Supreme Court, 28 U. S. C., Section 1257 (3).

STATUTE INVOLVED.

28 U. S. C. 1257 (3) provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTION PRESENTED.

Does the United States Supreme Court have jurisdiction to entertain a Petition for a Writ of Certiorari from the judgment of the Supreme Court of Missouri, when said judgment does not terminate the litigation between the parties on the merits of the case or affect any rights or privileges of petitioner?

STATEMENT.

Respondent, Dorothy Delores Pasternak, formerly Dorothy Delores Reddish, is the granddaughter and sole heir at law of the testatrix, Elizabeth Milanko. Respondent instituted this Will Contest action against petitioner as the beneficiary and executor of the Estate of Elizabeth Milanko, deceased, in the Circuit Court of the City of St. Louis on September 19, 1960 (R. 2-9).

Trial was had by jury in said Court, and on April 19, 1963, the verdict and judgment of the jury and Court found that the instrument in writing dated July 3, 1957, was not the Last Will and Testament of Elizabeth Milanko, deceased. An appeal was taken to the Supreme Court of Missouri by instant petitioner. The Missouri Supreme Court transferred said appeal to the St. Louis Court of Appeals on jurisdictional grounds. **Pasternak v. Mashak, Mo. Sup., 383 S. W. 2d 760.** The St. Louis Court of Appeals reversed and remanded the case for retrial on the ground that the evidence was insufficient to warrant a submission of an instruction on testamentary capacity, but sufficient to warrant a submission on the issue of undue influence. **Pasternak v. Mashak, Mo. App., 392 S. W. 2d 631.**

The second trial again occurred in the Circuit Court of the City of St. Louis, wherein a verdict and judgment was rendered in favor of proponents of the Will on April 29, 1966 (R. 623). Instant respondent filed her timely motion for new trial (R. 624-629), and said motion was sustained by the Trial Court (R. 631). The Trial Court filed in said cause its memorandum opinion in support of its action setting aside the judgment. (Supplemental Record pgs. 2-6; Appendix B, Pages A-9 to A-12.)

The instant petitioner, individually and as executor of the Estate of Elizabeth Milanko, deceased, perfected their

appeal to the Supreme Court of Missouri (R. 631, 632). On July 12, 1967, the Supreme Court of Missouri affirmed the judgment of the Trial Court awarding respondent a new trial. **Mo. Sup., Pasternak v. Mashak, 420 S. W. 2d ... (Appendix A, A-1 to A-9).**

ARGUMENT.

Title 28, U. S. C., Section 1257 (3) sets forth the jurisdiction of the United States Supreme Court to review judgments of the highest State Court. It specifically provides that a final judgment or decree may be reviewed by writ of certiorari under certain circumstances. In **Market St. Ry. Co. v. Railroad Commission, 65 S. Ct. 770, l. c. 773, 324 U. S. 548, 89 L. Ed. 1171,** this Court said:

> "Our justification to review a State Court judgment is confined by long-standing statute to one which is final. * * * Final it must be in two senses: it must be subject to no further review or correction in any other State tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final Court."

Obviously, the judgment of the Supreme Court of Missouri affirming a new trial in this Will Contest action does not constitute a final determination of the litigation between the parties. See also **Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., 73 S. Ct. 196, 344 U. S. 178, 97 L. Ed. 204,** and **Gospel Army v. City of Los Angeles, 67 S. Ct. 1428, 331 U. S. 543, 91 L. Ed. 1662.**

Petitioner does not lose his right to seek a review in this Court if a subsequent decision is rendered adversely to him in the State Supreme Court. **Urie v. Thompson, 69 S. Ct. 1018, l. c. 1025, 337 U. S. 163, 93 L. Ed. 1282.**

The decision rendered by the Supreme Court of Missouri is based upon adequate and independent State grounds. Petitioner's claim to a constitutional question arises solely on the theory that he, as a lawyer, has not been afforded the equal protection clause of the 14th Amendment to the Constitution of the United States. The Supreme Court of

Missouri held that petitioner's application of the 14th Amendment to this case gives no rise to a constitutional question, inasmuch as the relationship of attorney and client is one that should be zealously guarded by the Courts and is based on the public policy of discouraging transactions between attorneys, who stand in a fiduciary or confidential relationship, with a client. **Pasternak v. Mashak, Mo. Sup., 420 S. W. 2d ...,** reproduced in the Appendix A of the Petition (Pages A-1 to A-9, l. c. A-5).

It has been the position of this Court that it will not entertain a review of a State Court judgment which rests on independent and adequate State grounds, even where the judgment also decides Federal questions. **Henry v. State of Mississippi, 85 S. Ct. 564, 379 U. S. 443, 13 L. Ed. 2d 408.**

The substantive law of Missouri relative to a presumption of undue influence where an attorney or anyone having a confidential or fiduciary relationship with a testator, profits as the result of his being active in procuring or assisting in the preparation and execution of a Will, is well-entrenched. A landmark case is **Loehr v. Starke, 332 Mo. 131, l. c. 142, 56 S. W. 2d 772, l. c. 776,** where the Supreme Court of Missouri said:

> "The presumption under consideration is not a mere legal fiction or procedural rule. It arises on a substantial basis of fact or inference. The presumption and fact or inference go hand in hand and really are the same thing. Hence, the presumption, with its underlying facts or inferences, once being in the case, never does or can disappear but raises an issue for the jury."

Similar cases are **Cuthbert v. Heidzieck, Mo. Sup., 364 S. W. 2d 583; Laspy v. Anderson, Mo. Sup., 361 S. W. 2d 680, l. c. 682.** In the latter case the Supreme Court of Missouri held:

"The law is well-established in this state and elsewhere that public policy dictates the necessity to protect the confidential and fiduciary attorney-client relationship. Consequently, when a conveyance from a client to an attorney is attacked, it is considered presumptively fraudulent and the burden is upon the attorney to prove by convincing evidence that the transaction evidenced by the conveyance as well as the conveyance itself was free and equitable in every respect,"

It is therefore evident that not only is the petition for writ of certiorari in this instant case premature, it is also obvious that no constitutional question, whether of the United States or the State of Missouri is involved; and since this Court has adhered to the principle that it will not review judgments of State Courts that rest on substantial State grounds, certiorari will not lie. **Herb v. Pitcairn, 65 S. Ct. 459, 324 U. S. 117, 89 L. Ed. 789.**

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the Petition for Writ of Certiorari be denied at cost of petitioner.

Respectfully submitted,

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DUBINSKY & DUGGAN,
Attorneys for Respondent.